Petition

NO. 81-473

Office-Supreme Court, U.S.
FILED
SEP 8 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ERNEST BILLINGSLY,
Petitioner,

v.

JIMMY VANCE, CLYDE TAYLOR,
ERNEST LAMBERT and DONALD MORRIS, JR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

W. P. BOONE DOUGHERTY
531 Gay Street, Suite 1023
Hamilton Building
Knoxville, Tennessee 37902
(615) 637-6258

Attorney for Petitioner

TENNESSEE LAW PRINTERS, P. O. Box 377, Knoxville, Tennessee, Phone 525-4303
9-3-81-45

QUESTIONS PRESENTED

1. Whether 42 U.S.C. § 1983 requires official misconduct on the part of a public official in order to sustain a judgment against a private citizen.

2. Whether a private citizen acts under color of state law for the purposes of 42 U.S.C. § 1983 when the jury has found that the public official also charged has not conspired or acted in concert with the private citizen.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
OPINIONS BELOW 1
JURISDICTION 2
STATUTES INVOLVED 2
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 6
CONCLUSION 9
APPENDIX A – Order, C.A. 6, No. 80-1250, June 9, 1981 . . . . . A-1
APPENDIX B – Order, U.S.D.C., E.D. Tenn., March 20, 1980 . . . . . A-3
Memorandum, U.S.D.C., E.D. Tenn., March 20, 1980 . . . . . A-4

CITATIONS

Cases:

Adickes v. Kress & Co.,
398 U.S. 144 . . . . . 6, 7, 8

Baker v. McCollan,
443 U.S. 137 9

Dennis v. Sparks,
101 S.Ct. 183 . . . . . 6, 7, 8

Downs v. Sawtelle,
574 F.2d 1 . . . . . 5, 8

Kahermanes v. Marchese,
361 F.Supp. 168 8

Pierson v. Ray,
386 U.S. 547 . . . . . 5, 9

Statutes and Regulations:

Civil Rights Act of 1871, 42 U.S.C. § 1983 . . . . . 4, 5, 6, 7, 8, 9

Miscellaneous:

Cong. Globe, 42d Cong., 1st Sess. 390 (1871) . . 9

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ERNEST BILLINGSLY,
Petitioner,

v.

JIMMY VANCE, CLYDE TAYLOR,
ERNEST LAMBERT and DONALD MORRIS, JR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Ernest Billingsly, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, infra, p. A-1) is not officially reported as of yet. The opinion

of the District Court (Appendix B, infra, p. A-4) is reported at 487 F.Supp. 439 (E.D. Tenn. 1980).

JURISDICTION

The judgment of the Court of Appeals was entered on July 1, 1981. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

STATUTES INVOLVED

42 U.S.C. §1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

STATEMENT OF THE CASE

Ernest Billingsly has owned since 1969 a large tract of timberland in Scott County, Tennessee, across a portion of which the Tennessee Valley Authority holds a utility easement for its power lines. The property is crossed by a number of primitive roads that Mr. Billingsly constructed for use in his lumber and logging business. T.V.A. habitually uses the roads to reach its power lines, without Mr. Billingsly's permission but with his knowledge.

Every four years T.V.A. customarily repairs any road it needs for access to its easements by using a bulldozer to grade the roadbed and remove underbrush. In October, 1978, without notifying Mr. Billingsly, T.V.A. sent a road maintenance crew into his land to clear a logging road. The bulldozer operator was a trainee on his first job, and no one disputes that he did considerable damage to the road and the property on either side.

The maintenance job was to have taken several days. On the afternoon of October 28, 1978, when the T.V.A. crew had worked one day on the road, Mr. Billingsly learned from one of his own employees that someone had damaged the access road. He investigated the report that afternoon and the next morning took two county deputies to see the damage and the bulldozer, which had been left on the road overnight. The deputies advised Mr. Billingsly to seek civil redress.

Later that morning the T.V.A. crew returned and resumed work. While the four men were eating lunch at the worksite, Mr. Billingsly reappeared and insisted that they accompany him to the Scott County Sheriff's Department.

Only Deputy Griffith and a dispatcher, who was not available to testify at the trial upon which this appeal is taken, were on duty when the T.V.A. workers and Mr. Billingsly arrived. Deputy Griffith was not one of the officers who had visited the access road earlier in the day, and he testified that he was unaware that the earlier visit by the county deputies and the later detention of the T.V.A. crew at his office were related events. The employees waited in the sheriff's office while Mr. Billingsly secured affidavits of arrest against them for

criminal trespass and malicious destruction of property from the County Court Clerk.

Testimony conflicted somewhat about Deputy Griffith's participation in the arrest. He testified that he permitted the employees to use the phone, entered their names and license numbers in his logbook, accepted the affidavits from Mr. Billingsly, received a call from the County District Attorney instructing him to allow the employees to make their own bond, and left early after ordering the dispatcher to release the men on their own recognizance. The employees claimed that Deputy Griffith played a slightly more active role: that he appeared aware of the nature of the arrest, conferred with Mr. Billingsly about warrants necessary for detaining them, spoke over the telephone to a T.V.A. supervisor about the amount of bond likely to be necessary, and upon leaving, ordered the men locked in a cell.

About three hours after their arrival the four employees were released. The criminal misdemeanor charges, which had been removed by T.V.A. to federal court were later dismissed.

Subsequently, an action for damages, *Vance v. Billingsly*, No. 3-79-434 (Mar. 20, 1980), was brought against Mr. Billingsly, against a county deputy sheriff, and against Scott County, Tennessee, under § 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976).

Plaintiff's recovery at trial was premised solely upon the theory that Mr.Billingsly, a private citizen, conspired or acted in concert with the public defendants in instigating the unlawful arrest of four Tennessee Valley Authority employees whom he had discovered on his property and who he believed had damaged one of his logging roads with a bulldozer. See *Vance v. Billingsly*, No. 3-79-434

(Mar. 20, 1980). After proof was completed, Judge Robert L. Taylor instructed the jury that a finding of conspiracy or concerted action was essential to the liability of the private defendant under Section 1983. Judge Taylor instructed the jury on the elements of the good-faith defense available to the public officer under *Pierson v. Ray*, 386 U.S. 547 (1967). The jury returned a verdict in favor of the public defendants but found Mr. Billingsly liable for both compensatory and punitive damages to each plaintiff.

During trial, Mr. Billingsly twice moved to dismiss the complaint against him on the ground that the evidence introduced failed to establish the conspiracy or willful concerted activity between himself and the public defendants necessary to sustain the liability of a private defendant under § 1983. Both motions were denied. Mr. Billingsly later moved for a judgment notwithstanding the verdict or, in the alternative, for a new trial, on the ground that the jury's release of the public defendants negated action under color of law.

Judge Taylor issued a memorandum denying the motion. He held that as a matter of law a private defendant acts under color of state law if he participates in concerted activity with public defendants even if they have been exonerated because of good faith and probable cause.

The Sixth Circuit affirmed in an opinion relying upon *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir., 1978).

REASONS FOR GRANTING THE WRIT

This cause presents important questions of federal law which have not been, but should be settled by the Court, and the holding of the Sixth Circuit below is contrary to the applicable holdings of this Court and contrary to the spirit of 42 U.S.C. § 1983. This Court's decision last term in *Dennis v. Sparks*, ___ U.S. ___, 101 S.Ct. 183, 66 L.ed 2d 185 (1980), answered the important question of the liability of private citizens in regard to alleged conspiracies with public officials who are granted absolute judicial immunity under 42 U.S.C. § 1983. This case presents the question of the liability of private citizens in regard to alleged conspiracies with public officials who are granted a good faith defense to actions under 42 U.S.C. § 1983 and who are later found by the jury not to have performed the necessary "prohibited actions" as required by this Court in *Adickes v. Kress & Co.*, 398 U.S. 144, 152 (1970).

The specific holding of the Sixth Circuit in the case at bar was that, "Once concerted activity between public and private defendants is shown to involve a constitutional deprivation, a right of action exists against the private party which is not obliterated by a verdict in favor of the public defendants." (App. A, infra, p. A-2)

In the instant case the district court and appellate court both implicitly and expressly held that, even though there was no misconduct whatsoever on the part of the public officials, the private citizen could be held liable for damages under 42 U.S.C. § 1983.

Adickes v. Kress & Co., supra, involved a situation wherein a white woman teacher sought service at a store restaurant along with her six black students. The waitress

took the order of the six students but refused to serve the white teacher in company with the blacks. The teacher was later arrested for vagrancy by the Hattiesburg police after leaving the store. The teacher later brought suit under 42 U.S.C. §1983 alleging, among other things, a conspiracy between the police and the store. Reversing the lower courts as to the granting of a summary judgment on the conspiracy count this court held that a private party can be sued under 42 U.S.C. § 1983 without joining the public official involved but that the private party can only be acting under color of state law where the private party was ". . . jointly engaged with state officials in prohibited actions." *Adickes v. Kress & Co.*, *supra*, at 152. In other words there must be prohibited conduct on the part of both the private citizen and the public official before there can be action under color of law by the private party.

This Court's recent decision in *Dennis v. Sparks*, *supra*, involved allegations of conspiracy between a judge who had absolute immunity and private citizens. The Court allowed the action against the private citizens to proceed even though the judge was absolutely immune from suit, holding that private persons conspiring with a judge in reference to acts performed in his judicial capacity are acting under color of law, and the fact that the official is immune does not change the character of the judge's action nor that of the private co-conspirators.

Thus, in *Dennis v. Sparks*, *supra*, it was assumed that the "prohibited actions" required by *Adickes v. Kress & Co.*, were performed by both the private citizens and the public official. The court allowed the action to continue against the private citizens, even though the public official was immune from suit because all parties had performed

"prohibited actions". The court held that even though an action against the public official was barred by the doctrine of judicial immunity, this legal barrier did ". . . not change the character of the judge's action or that of his co-conspirators . . . Private parties who corruptly conpsire with a judge in connection with such conduct are thus acting under color of state law within the meaning of § 1983 as it has been construed in our prior cases." *Dennis v. Sparks*, *supra*, 101 S.Ct. at 186-187.

The case at bar differs drastically from *Dennis v. Sparks*, *supra*, and *Adickes v. Kress & Co.*, *supra*, in that both of the above cases involved "prohibited actions" by public officials in concert with the private citizen. These cases stand for the proposition that a private citizen can be sued under the provisions of 42 U.S.C. § 1983 where such "prohibited actions" are taken by both public and private parties acting in a conspiracy or in concert. They do not stand for the proposition, as implicitly expressed in the opinions below, that a private party can be held liable under 42 U.S.C. § 1983 even though the public official has been found to have committed no "prohibited actions" and has been absolved of any liability. (See also *Downs v. Sawtelle*, 574 F.2d 1 (1978), Chief Judge Coffin, dissenting).

In this regard, the requirement for official misconduct before imposing liability on a private citizen is consistent with the purposes of 42 U.S.C. § 1983.

Section 1983 is not aimed at purely private action. *Adickes v. S. Kress & Co.*, *supra*, at 163-65. Nor is it aimed at police officers who act in good faith upon the malicious complaints of private citizens. *Kahermanes v. Marchese*, 361 F.Supp. 168 (E.D. Pa. 1973). It is intended instead to provide private citizens with a means

of redress in federal court against those acts of official misfeasance or nonfeasance by which the State permits deprivation of federally protected rights. See Cong. Globe, 42d Cong., 1st Sess. 390 (1871).

It is an unjustified expansion of Section 1983 to recognize a cause of action whenever the law enforcement powers of the state are invoked by private citizens. A false arrest or conspiracy ceases to be purely a state tort and becomes a matter of federal concern only when the state itself, through its employees, commits an impermissible act that results in the deprivation of a constitutional right. *Pierson v. Ray*, 386 U.S. 547 (1967); *Baker v. McCollan*, 443 U.S. 137 (1979).

Further, there are important policy reasons why this court should grant the writ as prayed for. If the holdings of the courts below are allowed to stand they would act as a deterent to the active co-operation of private citizens and the police. Police enforcement of the law requires private assistance in many respects. If such public assistance were diminished or cut off, obviously police enforcement of the law would suffer drastically. The effect of the holdings below is to open the way for suit against private citizens who co-operate or assist police, even though all are acting in good faith.

CONCLUSION

Therefore, because an action under 42 U.S.C. § 1983 requires that the public official engage in prohibited acts along with the private citizen; and, because the purposes of § 1983 are fully implemented only where "prohibited actions" are performed by the public officials involved;

and, because there are important policy considerations which require that the decisions below be reviewed by this Court, the petition for a writ of certiorari should be granted.

Respectfully submitted,

W. P. BOONE DOUGHERTY
531 Gay Street, Suite 1023
Hamilton Building
Knoxville, Tennessee 37902
(615) 637-6258

Attorney for Petitioner

DOUGHERTY AND ALLIMAN
Of Counsel

Appendix

APPENDIX A

NO. 80-1250

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JIMMY VANCE, CLYDE TAYLOR, ERNEST LAMBERT and DONALD MORRIS, JR., *Plaintiffs-Appellees*

v.

ERNEST BILLINGSLY, *Defendant-Appellant*

FILED

JUNE 9, 1981

JOHN P. HEHMAN, Clerk

ORDER

BEFORE: EDWARDS, Chief Judge; LIVELY, Circuit Judge; and PECK, Senior Circuit Judge.

In this action the plaintiffs brought suit pursuant to 42 U.S.C. §1983 against the defendant-appellant who is a private citizen, a deputy sheriff of Scott County, Tennessee and the County, alleging unlawful arrest, illegal confinement and malicious prosecution. The jury returned a verdict in favor of the deputy sheriff and the County, but against the defendant-appellant and awarded compensatory and punitive damages to each of the plaintiffs.

On appeal the defendant contends that the evidence did not establish the existence of a conspiracy or any willful

concerted actions between himself and the public defendants such as is required to sustain liability of a private defendant under Section 1983. The defendant asserts that the verdict exonerating the public defendants ruled out any finding that the defendant-appellant acted "under color of state law."

[2]

Upon consideration of the briefs and oral arguments of counsel together with the record on appeal, the court concludes that the jury's general finding in favor of the public defendants did not require a finding in favor of the defendant-appellant. Once concerted activity between public and private defendants is shown to involve a constitutional deprivation, a right of action exists against the private party which is not obliterated by a verdict in favor of the public defendants. *Cf. Downs v. Sawtelle*, 574 F.2d 1 (1st Cir.), *cert. denied*, 439 U.S. 910 (1978).

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

ISSUED AS MANDATE: JULY 1, 1981
COSTS: NONE

APPENDIX B

In The
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
Northern Division

JIMMY VANCE, CLYDE TAYLOR, ERNEST LAMBERT and DONALD MORRIS, JR.	)	FILED MARCH 20, 1980
v.	)	CV 3-79-434
ERNEST BILLINGSLY	)	

ORDER

For the reasons stated in a memorandum handed this day to the Clerk for filing, it is ORDERED that defendant's motions for judgment notwithstanding the verdict and for a new trial be, and the same hereby are, denied.

Enter:

/s/ ROBERT TAYLOR
United States District Judge

In The
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
Northern Division

JIMMY VANCE, CLYDE TAYLOR, ERNEST LAMBERT and DONALD MORRIS, JR. *Plaintiffs,*	)	FILED MARCH 20, 1980
v.	)	CV 3-79-434
ERNEST BILLINGSLY *Defendant.*	)	

MEMORANDUM

This is an action for damages premised solely on 42 U.S.C. § 1983.[1] Plaintiffs, four employees of the Tennessee Valley Authority (TVA), were allegedly arrested and detained for trespassing by defendant Billingsley, a private citizen, and defendants Scott County and Deputy Griffith, concededly public officials (hereinafter "public defendants"), in violation of their constitutional rights. Following trial, the jury returned a verdict in favor of plaintiffs against Billingsley, but in favor of the public defendants.[2]

---

[1] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2] The public defendants and plaintiffs had compromised their case before a verdict by the jury was rendered, but the jury was not informed of this compromise.

[2]

Defendant Billingsley has timely moved, pursuant to Fed.R.Civ.P. 50(b), for a judgment notwithstanding the verdict or, in the alternative, for a new trial, on the ground that exoneration of the public defendants is, as a matter of law, inconsistent with the imposition of liability upon defendant Billingsley under § 1983. Having thoroughly considered the arguments of counsel, we are constrained to overrule the motion.

Two elements are necessary for recovery under § 1983. First, the defendant must be found to have deprived plaintiff of some right, privilege, or immunity "secured by the Constitution and laws" of the United States. Secondly, the defendant must have acted "under color of law." *Adickes v. Kress and Co.*, 398 U.S. 144, 150 (1970). The precise issue before the Court is whether, where the under-color-of-law prong is based solely on concert of action between the private defendant and the public defendants, and the public defendants are exonerated from liability by a jury, the private defendant can nevertheless be held liable under § 1983.[3] We hold that he can.

The evidence introduced during trial could fairly support a conclusion by reasonable minds either that the public defendants were involved in concerted action with Billingsley, or that they were not. We are, therefore, not at liberty to disturb that finding. *Price v. Firestone Tire*

---

[3]For the purposes of this motion, the parties do not dispute that the arrest in this case violated the plaintiffs' Fourteenth Amendment rights. Further, plaintiffs concede that the issue of whether a citizen's arrest pursuant to the Tennessee citizen's arrest statute, T.C.A. § 40-816, was never presented to the jury. (Pl. Brd. at 1). Finally, plaintiffs' counsel does not argue that Billingsley conspired with any unnamed defendants.

[3]

and Rubber Co., 321 F.2d 725 (6th Cir. 1963). The question presented is purely one of law and may be properly determined on a Rule 50(b) motion. *Texas Continental Life Ins. Co. v. Dunne*, 307 F.2d 242 (6th Cir. 1962).

Section 1983 is not aimed at the redress of deprivations committed solely by private individuals. It is only when the State has become involved that the section comes into play. *Adickes, supra*; *McShane v. Moldovan*, 172 F.2d 1016 (6th Cir. 1949) (construing predecessor statute). The requirement of State action can be satisfied by the establishment of a conspiracy between private individuals and public officials, or by a showing that plaintiffs' rights were violated as a result of their concerted action.

> The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment . . . rights, whether or not the actions of the police were officially authorized, or lawful. [citations omitted] *Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983.* "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. *It is enough that he is a willful participant in joint activity with the State or its agents.*" *United States v. Price*, 383 U.S. 787, 794 (1966).
>
> *Adickes, supra*, at 152. (Footnote omitted) (Emphasis added.)

In *Adickes*, plaintiff sued a private eating establish-

ment under § 1983 alleging that it had deprived her of her equal protection rights by refusing her service because she was in the company of some black people. She did not join the police officer with whom the defendant had allegedly conspired.

[4]

Nevertheless, the Supreme Court reversed the district court's entry of summary judgment in defendant's favor, holding that plaintiff's uncontroverted affidavit fairly presented a factual issue as to whether an "understanding" between a Kress employee and the police existed. *Adickes*, *supra*, at 152, 157.

Thus, the under-color-of-law requirement creates a threshold jurisdictional issue. There is no requirement that the other conspirators be joined, or even found liable. *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir. 1978), cert. den. 439 U.S. 910. For once concerted action has been made out, an independent cause of action lies against the private individual which cannot be defeated by defenses available only to the public officials. As the First Circuit, through Judge Coffin, has stated:

> The concerted action which permits a finding of state action cannot simply be erased by the absence of the state actor as a defendant or by the fact that the state actor might later raise a successful defense to plaintiff's claim. *Downs v. Sawtelle*, *supra*, at 15.

The jury was instructed that in order to find defendant Billingsley liable, it must find either that he entered into a conspiracy with the public defendants, or that he acted in concert with them. These possibilities are distinct and were presented in the alternative. The difference is one of degree. Thus, while a conspiracy necessarily involves a preconceived plan agreed upon by the conspirators

[5]

to accomplish a common goal, concerted action only requires "willful participa[tion] in joint activity." *United States v. Price*, 383 U.S. 787 (1966).

The proof shows that defendant Billingsley was perceived to be a powerful and influential man in the Scott County community. The proof further shows that he knowingly caused defendant Griffith to hold plaintiffs at the jail while he secured a warrant for their arrest. Based upon this evidence, the jury could have found that defendant Griffith, as well as other Scott County officials, fully cooperated with Billingsley in his own personal efforts to effect the arrest of plaintiffs. Billingsley was clearly a "willful participant", and the cooperation of the public defendants provides the "joint activity" necessary to sustain § 1983 liability. *Adickes*, *supra*.

The good-faith defense available to police officers, *Pierson v. Ray*, 386 U.S. 547 (1966), has not been extended to private citizens. *See Downs v. Sawtelle*, *supra*, at 15. The test for establishing the defendant's good faith was announced in *Wood v. Strickler*, 420 U.S. 308, 322 (1975):

> A compensatory award will be appropriate only if the [defendant] . . . acted with [malicious intention] or with such disregard of the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

There is evidence in the record to support the jury's finding that the public defendants in this case bore no personal

[6]

animus toward the plaintiffs, and that they did not act

unreasonably in believing defendant Billingsley's complaints against the plaintiffs. Such a finding does not contradict the jury's finding that Billingsley was a "willful participant in joint activity" with the public defendants, but only exonerates the public defendants from ultimate liability. *Downs v. Sawtelle, supra.*

Defendant Billingsley argues that a private individual is legally incapable of conspiring with an immune State official for the purposes of establishing the under-color-of-law requirement of § 1983. *Sykes v. State of California*, 497 F.2d 197 (9th Cir. 1974); *Meyer v. Lovelle*, 389 F.Supp. 972 (E.D. Pa. 1975). Assuming, arguendo, this to be the law in this Circuit, these cases only apply to officials who are absolutely immune from § 1983 liability. Any conspiratorial activity undertaken by them cannot, for the purposes of § 1983, be said to be within the scope of their official duties. *Bradley v. Fisher*, 13 Wall. 355 (1872); *Pierson, supra.* The defense of good faith, by contrast, does not defeat the plaintiff's cause of action at the outset, but, successfully raised, only serves to defeat the defendants' liability. The plea of good faith does not affect a public official's legal capacity to "reach an understanding with" a private individual. *See Adickes, supra*, at 152, 157.

In any event, the evidence supports a verdict based upon concerted action which, as we have previously pointed out, does not rise to the level of a formal conspiracy.

[7]

Defendant Billingsley has moved in the alternative for a new trial, upon which motion we are required to conditionally pass. Fed.R.Civ.P. 50(c)(1). As noted above,

we view the issue raised by the defendant as one purely of law. The factual findings of the jury are amply supported by the evidence. Accordingly, the motion for a new trial is denied.

For the foregoing reasons, it is ORDERED that defendant's motions for judgment notwithstanding the verdict and for a new trial be, and the same hereby are, denied.

Order accordingly.

/s/ ROBERT TAYLOR
United States District Judge

Opposition

NO. 81-473

Office - Supreme Court, U.S.
FILED
OCT 28 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ERNEST BILLINGSLY,
Petitioner,

v.

JIMMY VANCE, CLYDE TAYLOR,
ERNEST LAMBERT and DONALD MORRIS, JR.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HERBERT S. MONCIER
1832 United American Plaza
Knoxville, Tennessee 37929
(615) 546-7746

Attorney for Respondents

TENNESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee, Phone 525-4203
10-23-81-48

QUESTIONS PRESENTED

Appellant has altered the question presented to the Sixth Circuit Court of Appeals in this cause, which was:

1. Can a private defendant be held liable under Section 1983 if the only public defendant with whom he is alleged to have conspired acted in good faith and with probable cause?

This question as restated on Petition for Writ of Certiorari to this Court is as follows:

2. Whether 42 U.S.C. §1983 requires official misconduct on the part of a public official in order to sustain a judgment against a private citizen.

3. Whether a private citizen acts under color of state law for the purposes of 42 U.S.C. §1983 when the jury has found that the public official also charged has not conspired or acted in concert with the private citizen.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 2

ARGUMENT IN OPPOSITION TO GRANTING THE WRIT 4

CONCLUSION 9

TABLE OF AUTHORITIES

Cases:

Adickes v. S. H. Kresge & Co., 398 U.S. 144, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970) 7

Dennis v. Sparks, ___ U.S. ___, 66 L.Ed.2d 185, 101 S.Ct. ___ (1980) 4

Downs v. Sawtelle, 574 F.2d 1 (1st Cir. 1978) 4

Duriso v. K-Mart, 559 F.2d 1274 (5th Cir. 1977) 7

Owen v. City of Independence, 445 U.S. 622, 63 L.Ed.2d 673, 100 S.Ct. 1398 (1980) 6

Smith v. Brookshire Brothers, Inc., 519 F.2d 93 (5th Cir. 1975) 7

United States v. Price, 383 U.S. 787, 16 L.Ed.2d 267, 86 S.Ct. 1152 (1966) 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-473

ERNEST BILLINGSLY,
Petitioner,

v.

JIMMY VANCE, CLYDE TAYLOR,
ERNEST LAMBERT and DONALD MORRIS, JR.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents, Jimmy Vance, Clyde Taylor, Ernest Lambert, and Donald Morris, Jr., respectfully oppose Petitioner's application for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case and respectfully urge that there is no new question of law to be resolved on this appeal and that there presently exists no conflict in the decisions of the Circuit Courts with regard to the questions submitted.

STATEMENT OF THE CASE

The Tennessee Valley Authority (TVA) maintains and operates a utility service through timberland of Scott County, Tennessee, providing the lifeline of utility services to the cities of Huntsville and Oneida, Tennessee. These lines are maintained on a four year schedule and because of the mountainous terrain access is gained to the utility easement by means of timber roads. At trial, testimony conflicted as to who built these timber roads but it is clear that they had been used by the TVA for purposes of maintaining the utility lines and had been maintained on a regular basis by the TVA with the knowledge of Petitioner. Prior recorded deeds to Petitioner's lands contain easements granting TVA the rights-of-way for electrical transmission lines and a grant for ingress and egress to the power lines with the TVA being liable for damages to the property caused by its crews.

During the Fall of 1978, Defendant Jimmy Vance, a TVA maintenance supervisor, traversed the roads in question and found them unpassable at places. He ordered maintenance crews to clear and improve the roads for purposes of gaining access to the utility easement. On October 23, 1978, Petitioner learned of TVA's presence on these roads and decided to arrest the persons present. On October 24, 1978, he called Scott County deputies to the property to arrest the persons, but did not find anyone. He was advised by one of the deputies that he should obtain civil process. Later, on October 28, 1978, Mr. Vance along with Defendant Donald Morris went to the job site during lunchtime and met Clyde Taylor who had been on the job for approximately one and one-half days and Ernest Lambert, the bulldozer operator who was actually doing the work.

As the men were eating lunch, they were approached by Petitioner, informed by Petitioner that he had experienced problems with TVA before; that TVA only knew force; that the sheriff had been out previously to arrest them and that they could either accompany him to jail or he would have them arrested. The four men accompanied Petitioner to the Scott County Jail and were presented to the Chief Deputy of Scott County where they were held while Petitioner went to the Clerk's office and filled out an Affidavit of Complaint. Petitioner did not appear before a magistrate nor was an arrest warrant obtained. While Petitioner was at the Clerk's office Respondents were booked by the Chief Deputy and allowed to call their supervisor at TVA.

The Chief Deputy informed the supervisor that it would cost $500.00 to get them out of jail. Thereafter, Petitioner returned with the Affidavits of Complaint and gave them to the Chief Deputy and inquiry was made concerning attaching the bulldozer. Petitioner then sought a civil attachment of the bulldozer.

Before departing the Sheriff's Office to attend a sporting event, the Chief Deputy ordered that Respondents be locked in a cell until their supervisor came for them and signed for their release.

Thereafter, the cases were removed to Federal District Court. On motion of Respondents the cases were dismissed due to fatally defective arrest warrants. Although being advised by the Federal District Court that these were not criminal matters, Petitioner sought out and obtained new arrest warrants in Scott County which were again removed to Federal District Court. At the close of the State's proof the criminal warrants were dismissed.

This action under Title 18, U.S.C. § 1983, was instituted against Petitioner, the Chief Deputy for Scott County

and Scott County, Tennessee. During jury deliberations, the actions against the Chief Deputy Sheriff and Scott County, Tennessee, were settled and compromised and the Court was notified. However, upon the Court receiving the verdict against Defendant Billingsly the jury likewise announced its verdict in favor of the Chief Deputy and Scott County, Tennessee. This verdict was held for naught and stricken from the record by the District Court and no further action was taken thereon.

ARGUMENT IN OPPOSITION TO GRANTING THE WRIT

Petitioner has cited no decisions supporting his position. Nor has Petitioner cited any conflict among the Circuits pertaining to the questions presented. Indeed, it appears that Petitioner's entire argument is premised upon the mistaken predicate that the public officials in this case did nothing wrong. Petitioner developed this argument from the jury's verdict in favor of the Chief Deputy and Scott County, Tennessee, which was accepted by the Court and was stricken from the record due to the compromise and settlement of the action against those Defendants. Consequently, there has been no finding in this case that the public Defendants were not guilty of misconduct.

This Court's decision in *Dennis v. Sparks*, ___ U.S. ___, 66 L.Ed.2d 185, 101 S.Ct. ___ (1980), held that the granting of immunity to a judicial officer would not act as a bar to an action against private individuals who acted in joint concert with or conspired with the judicial officer. This Court denied Certiorari on this very issue in the case of *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir. 1978), *cert. den.* 439 U.S. 910, 58 L.Ed.2d 255, 99 S.Ct. 278. In the *Downs* case the First Circuit held:

The significance of this holding [*Adickes v. S. H. Kresge and Co.*] becomes apparent only in the context in which it was announced – the plaintiff sought damages from the private party alone, and neither the state nor any state official was joined as a defendant. It is thus plain that once the requisite showing of concerted action is made, and assuming that some colorable constitutional deprivation is made out, the injured party has an independent cause of action for damages against the private party involved. The ultimate destiny of the private party can in no way be said to depend upon the status of the official with whom he conspired or upon the defenses available to that official. The concerted action which permits a finding of absence of the state actor as a defendant or by the fact that the state actor might later raise a successful defense to the plaintiff's claim. Nor can it be said that a private individual shown to have acted in concert with state officials may rely upon any type of qualified immunity, whether derivatively or otherwise. In *Monroe v. Pape*, [citation omitted] the Supreme Court held that Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions". In the case of public officials the Court has reasoned that a "good faith" qualified immunity is an integral part of this background [citation omitted] and that certain officials are therefore entitled to rely upon such an immunity. But the Court has never held that private individuals are in any way shielded from damage liability in a comparable fashion. To the contrary, the Court in *Adickes* recognized

> the plaintiff's right to proceed solely against the private defendant, despite the fact that three years earlier the Court had sanctioned a qualified immunity for the police officers with whom the defendant allegedly had conspired. [Citation omitted].
>
> To place this court's imprimatur upon an immunity in favor of a private individual could in many instances work to eviscerate the fragile protection of individual liberties afforded by the statute. Private parties simply are not confronted with the pressures of office, the often split-second decision-making or the constant threat of liability facing police officers, governors and other public officials. Whatever factors of policy and fairness militate in favor of extending some immunity to private parties acting in concert with state officials were resolved by Congress in favor of those who claim a deprivation of constitutional rights. Consequently, we hold that the *Wood* defense is not available to Roberta Sawtelle and that her liability is to be determined by the jury without regard to any claim of good faith.
>
> 574 F.2d at 15-16.

This Court has refused to extend the defense of "good faith" further than that which is necessary to effect its purpose. See *Owen v. City of Independence*, 445 U.S. 622, 63 L.Ed.2d 673, 100 S.Ct. 1398 (1980). Respondents assert that Petitioner has shown no authority for insulating private persons who may act in joint concert with public officials acting in good faith.

Where, as here, Deputy Griffin might arguably be excused by his "good faith" belief he was acting legally, Ernest Billingsly can not. He was not acting under the

"split-second decisionmaking" the *Downs* court spoke of. Rather, he was a wealthy, influential land owner in a small county with a grievance against the Tennessee Valley Authority. As the District Court found, he was a "willful participant" in a deliberate attempt to cause plaintiffs' arrest to secure monetary gain from TVA, and to do so by means of depriving Plaintiffs of their constitutionally guaranteed rights. The fact that Deputy Griffin could assert an affirmative defense to his liability should not, and cannot, excuse Billingsly from his actions.

Pettitioner is under the mistaken belief that there must be a finding of liability on the part of the public official before an action may be maintained against a private individual acting in joint concert or conspiracy with the public official. The cases of *Adickes v. S. H. Kresge and Company*, 398 U.S. 144, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970); *Duriso v. K-Mart*, 559 F.2d 1274 (5th Cir., 1977); *Smith v. Brookshire Brothers, Inc.*, 519 F.2d 93 (5th Cir., 1975), all involve Title 42 U.S.C. §1983 actions against private individuals without the joinder of the public co-conspirator or joint actor. Once it is shown that a private individual is a willful participant in joint activity with the State or its agents a private party becomes independently liable under Section 1983. *Adickes v. Kresge, supra*; *U. S. v. Price*, 383 U.S. 787, 16 L.Ed.2d 267, 86 S.Ct. 1152 (1966); *Downs v. Sawtelle, supra*.

It is clear from the evidence presented, and the Trial Court so found, that Petitioner was perceived to be a powerful and influential man in the Scott County community. His hostility toward the Tennessee Valley Authority preceding the events in question was evident. In fact, he had verbally offered to Tennessee Valley Authority attorneys a settlement which included the dis-

missal of the criminal suits which was termed blackmail by Petitioner and at one time apologized to the Respondents for having to prosecute them to get TVA's attention. It is uncontested that Petitioner sought to have Respondents arrested earlier on the same day and was informed by officers that he should pursue the matter in civil court. Nevertheless, utilizing his power and influence, Petitioner caused the Chief Deputy to hold the Respondents at the jail while he attempted to obtain criminal process. Pursuant to his directions the Respondents were booked, bail was set by the Chief Deputy, and they were jailed until their supervisor came for them, all without criminal process or any probable cause determination. Petitioner further obtained an Affidavit of Complaint from the Clerk of the Court for which no probable cause was shown and upon which defective process Respondents were held. His motive was clear, i.e., to obtain money from the TVA; his method was by abuse of Respondents by his influence and control over the offices of Scott County, Tennessee. For Petitioner to accomplish his objective the joint concert by State officials was necessary and provided the means by which he could ultimately extort the funds desired.

Although the Trial Judge mistakenly instructed the jury that Petitioner Billingsly was entitled to the same defense of good faith which was applicable to the public defendants [App. 281a], the jury obviously rejected this defense.

CONCLUSION

The issues presented by Appellant have been settled by this Court's previous decision of *Dennis v. Sparks*, *supra*. The case of *Downs v. Sawtelle*, *supra*, specifically answers the questions presented by Appellant, which case is undisputed among the Circuits and for which this Court previously denied a Writ of Certiorari.

Public defendants are not necessary parties to an action under Title 42 U.S.C. §1983 wherein it is alleged that private individuals acted in joint concert with or in conspiracy with the public officials to deny an individual constitutionally protective rights. The record in this case clearly indicates the joint concert requisite to such an action and the mistakenly announced jury verdict in favor of Scott County and the Chief Deputy was later set aside, stricken and held for naught. The reliance of Appellant on this voided verdict should, even if relevant, have no affect on this issue.

It is undisputed that Appellant effected a denial of Respondents' constitutional rights and privileges and that in so doing he employed and acted in joint concert with public officials in Scott County, Tennessee. As such, he is subjected to the actions under Title 42 U.S.C. §1983 and that the immunity or lack thereofof the public officials has no bearing on his liability.

Respondents respectfully request that the Writ for Certiorari be denied.

Respectfully submitted,

HERBERT S. MONCIER
1832 United American Plaza
Knoxville, Tennessee 37929
(615) 546-7746

Attorney for Respondents